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FILED
NOV 7 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 653

HOTEL MARKHAM, INC., ET AL.,
Petitioners,

versus

EDWARD BALL, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Petition, particularly the "Statement" (pp. 2-7) omits so many important facts and contains so many incorrect conclusions, that a brief restatement is necessary in order to give this Court a clear picture of what occurred in this case in the lower courts. In fact, it is difficult to understand how Petitioners could have so confused the facts and issues presented to and decided by the Circuit Court of Appeals.

RESTATEMENT OF CASE.

This is a suit by Ball et al., cestui and holders of Certificates of Deposit, against Defendant Trustees, members of a Bondholders Committee. The Committee was self-constituted, (R. pp. 73-4) and prepared the so-called Protective Agreement. They solicited the deposit with them, under the agreement, of bonds of Gulfport Hotel Company. The bonds deposited with them were used by them in the purchase of the hotel property at a foreclosure sale under the mortgage which secured the bonds. (R. p. 89) Having acquired title to the property, they then, in accordance with the laws of Mississippi, executed and recorded a formal Declaration of Trust (R. pp. 78-9) by the terms of which they obligated themselves as Trustees to hold the property *in trust for the pro rata benefit of the depositing bondholders of Gulfport Hotel Company* and to distribute the income and proceeds in "*monies, stocks, bonds, securities and other properties received by them from a sale and conveyance of such properties and/or pursuant to any plan of reorganization effected by such committee, after all obligations of such committee and all lawful claims against such property, if any, have been fully paid*".

The Committee did not sell the property. Instead it elected to and did effect a reorganization by adding new members (whom they selected) and by obtaining a corporate charter for Hotel Markham, Inc., to which they conveyed title to the property (R. pp. 89-95). As consideration for that conveyance of the trust property, the Corporation (the Committee, being its officers, directors and stockholders) issued to the Committee all of the stock of

the corporation and all Debentures of the corporation totalling approximately $600,000. (R. p. 247 and p. 454). The Committee deposited the stock and debentures with a bank, which issued to each depositor of Gulfport Hotel bonds a Certificate of Deposit which included an express provision that the Committee was holding for the account of the owners a certain number of shares of stock in Hotel Markham, Inc., and certain specifically designated and numbered debentures. The Trustees (Committee) have retained possession of the stock and debentures of Hotel Markham, Inc., and control and the management of the Hotel property for ten years; they have paid all obligations created by the Committee. (R. p. 383) The corporation still holds title to the property and has been operating at a profit.

The so-called Protective Agreement is to be construed against the Committee, which proposed it. The Committee was organized for the benefit of holders of *bonds of the old Gulfport Hotel Company.* It was not a voting trust, and made no provision for control of the voting power of stock in Hotel Markham. It does not purport to be a Trust of the securities of Hotel Markham, Inc. These securities were received and held by the Committee solely as a result of the transfer of title to the corporation and are held under the terms of the *original Declaration of Trust.* The Committee was not *required* to organize a new corporation. It did so on its own responsibility. *Having paid the obligations which as trustees they incurred and having reorganized the property by transferring title to Hotel Markham, Inc., the new corporation, in exchange for all of its stock and debentures,* it became the duty of the

Committee under the Declaration of Trust to distribute the securities so received and held by them when their obligations had been paid.

But when that time arrived, the Committee conceived the idea that they should assume the duty of protecting, (R. p. 489) *as they say*, a minority of certificate holders (which included members of the Committee) against a majority held by Plaintiffs Ball et al., by retaining control of the property through their control of the securities of Hotel Markham, Inc., though there was not a single word in either the Protective Agreement, or the Declaration of Trust authorizing them so to do. Using this self-imposed duty as an excuse, (R. p. 489) the Committee in 1939 authorized an issue of Refunding Debentures of over $800,000. (R. pp. 477-481) (twice the value of the property) maturing in 1949, to be issued in exchange for the original Debentures that were issued at the time title was conveyed to the corporation and which matured in 1940. The purpose of this issue was to perpetuate their control of the corporation and its property for another ten years. This suit was brought to restrain the issue of these Refunding Debentures, to terminate the Trust and to require delivery to Plaintiffs of the stock and debentures held by Defendants for their account. (R. pp. 51-2)

The Circuit Court of Appeals held that "the Committee was without power to extend its authority and continue its control indefinitely over plaintiffs' debentures and stocks"; "that the committee gravely abused its discretion in undertaking to issue" these refunding debentures "and thus

perpetuate their control for an additional ten-year term," and that the District Court erred in refusing to restrain the issue of them.

Since the Complaint prayed for an injunction against the issue of Refunding Debentures, which was denied by the District Court, and the Circuit Court of Appeals holds that an injunction should have been granted, that decision does not constitute a case for review by this Court. Writs of Certiorari are not issued by this Court to review evidence or to decide issues of fact. *U. S. v. Johnston*, 268 U. S. 220, 69 L. ed. 925; *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. ed. 385. Neither the Petition nor the Brief directly challenge the decision of the Circuit Court of Appeals, holding the Refunding Debentures void.

The Circuit Court of Appeals also held that "it was erroneous to dismiss their (Plaintiff's) bill without giving fuller consideration to whether under all the facts Plaintiffs should not have had the relief of delivery of their stock and surrender by Defendants of their control at a time under conditions to be fixed and determined by the court, or whether some other appropriate relief should not have been granted them".

Since these void Refunding Debentures were issued and interest paid on them after injunction was denied by the District Judge, it is now necessary to adjust the equities and determine just how and what relief can be decreed. The Appellate Court could not enter a final decree. It could only indicate by its opinion that the Trust should be terminated since the purpose of the Trust had been accomplished.

The Circuit Court of Appeals did not as the petition says (p. 6) direct the District Court to give "further consideration to any other plan that might be presented for saving the Trustee Corporation". Hotel Markham, Inc., is not a *"Trustee Corporation"*. Its stock is held by the Trustees. It has been operating at a profit. It belongs to the beneficial owners of the securities now held and controlled by the Committee as Trustees.

The statement on page 7 of the Petition that the Circuit Court of Appeals directed the District Court "to take over the trust for judicial administration and control" is not supported by any statement in the opinion of that Court. Other statements on page 7 are equally as inaccurate, and show that Petitioners have completely misunderstood the apparently simple terms of the opinion and order of the Circuit Court of Appeals.

The statement of Petitioners (pp. 2-3) that they "seek review by this Honorable Court by petition for certiorari, and a reversal of the judgment entered against them and the reinstatement of the judgment of the District Court", indicates that they regard their Petition as an appeal to review what they say is an erroneous decision and, so far as we can discover, the only real reason they have for filing the Petition is their desire to obtain another hearing. This is borne out by what are termed "Questions Presented" (Petition, pp. 9-14). Here are sixteen general questions, some of them having four sub-questions, which apparently are treated as assignments of error. All would require a review of the facts. Petitioners have not even attempted to show that the case presents a question of

sufficient importance to justify this Court in assuming jurisdiction. The case therefore involves only matters of private interest.

Petitioners were, however, aware of the necessity for making at least a superficial compliance with Rule 38, of this court, paragraph 5, and on pages 15-17 have included what they call "Reasons for allowance of writ". Though Reasons I, II, and V contain statements using generally the phraseology taken from Rule 38, these assertions are not supported. All of the "Reasons" (Petition, pp. 15-17) and the "Argument" on all of them (Petition, pp. 27-36) evidence a complete misunderstanding of what the lower court decided. This will appear from a brief analysis of these so-called "Reasons".

I.

The Circuit Court of Appeals has decided an important question of local law in a way which is probably in conflict with local decisions.

Under this heading (Petition, p. 15) we find a general assertion that the Circuit Court of Appeals has decided a question of local law contrary to applicable decisions by the Courts of Mississippi. But neither here nor in the argument under this heading (Petition, p. 27-28) is a Mississippi case cited as holding to the contrary; nor is there even an attempt to show where there is a conflict. *Edward Hines Yellow Pine Trustees v. Martin* 268 U. S. 458, 69 L. ed. 1051 (which is referred to) does contain a general discussion of the law of trusts, but neither in the facts nor

in the law does that decision conflict with the decision of the Circuit Court of Appeals in this case. The same is true of *Hiserodt v. Hamlett*, 74 Miss. 37, 20 So. 143 cited in the brief, (Petition, p. 24).

The Petition (p. 15) asserts that the Circuit Court "has assumed that an abuse of discretion authorizes the termination of a trust." We are unable to find any basis for this statement in the opinion of the Circuit Court of Appeals.

The Petition (p. 15) says "that on a judicial administration it (the Court) could still compel and control the actions of these same Trustees *** on the theory that they were trustees of the powers after the properties had been given to the beneficiaries". Courts of equity have always had the power to compel Trustees to perform their duties, to prevent abuse of their discretion and power (Restatement of the Law of Trusts Chap. VII, sec. 187), but the Circuit Court of Appeals makes no reference to such a "theory" as stated by Petitioners. Petitioners seem to have the impression that the decision involves a question of Federal procedure. But the decision rests entirely upon substantive law. It decides only two things:

1. that the District Court erred in refusing to enjoin the issue of Refunding Debentures since the issue of them was a grave abuse of discretion by Defendant Trustees.

2. that the District Court should not dismiss the bill without fuller consideration of whether Plaintiffs should not have had the relief of delivery of the securities

and a surrender by Defendants of their control, or some other form of appropriate relief.

Neither the so-called "Reason I" nor the argument (Petition, p. 28) under this heading indicates where there is any conflict with Mississippi law.

On the other hand, *Brandon v. Brandon*, 36 Miss. 222, *Prevatt v. Lord*, 36 Miss. 395, *Wade v. American Society*, 15 Miss. 663, and *Woodruff v. State*, 77 Miss. 68, 25 So. 483 in substance sustain the power of courts of equity over the administration of trusts.

II.

The Circuit Court of Appeals has departed from the accepted and usual course of proceedings in such manner as to call for an exercise of this Court's power of supervision.

"Reason" II charges the Circuit Court with a far departure from the usual course of judicial proceedings, but does not show where there was such departure. This so-called "Reason" seems to be based on the idea that the decision of the Circuit Court of Appeals rests on facts to which the District Judge failed to give due consideration. The Circuit Court of Appeals did predicate its decision in large measure on the express terms of the Declaration of Trust. The District Court gave that document little or no consideration. The Circuit Court of Appeals did hold that the Protective Agreement did not impose upon the Committee the duty of protecting a minority of holders

of Certificates of Deposit in Hotel Markham securities against the wishes of the holders of a majority, a fact which the District Court overlooked or ignored. But the Circuit Court of Appeals did not hold that the Agreement afforded "*no protection* to certificate holders"; it held that the Committee was not charged with responsibility for taking sides in this controversy between beneficial owners of the securities of Hotel Markham, Inc.

The statement in the Petition (Petition p. 16) that the Court remanded this case to the District Court with directions to "reorganize" what Petitioners choose to call the "Trustee Corporation" is gratuitious. The Court's opinion speaks for itself. That opinion includes express directions to the lower court, clearly states the grounds of decision and shows the purpose of the Court. The decree is not only not a departure from, but follows the usual course of procedure. The Trustees, having abused their power by issuing Refunding Debentures after the injunction to prevent their issue was denied by the District Court, those Debentures are void, and an appropriate form of relief to be granted Plaintiffs now, can be determined only after further consideration of the facts and circumstances in the light of the law of the decision of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals is, in effect, that the Trust should be terminated, either by delivery of the original securities to the Plaintiffs, or, if this is now impossible, in some manner that would be equitable. Since the Refunding Debentures are void, the District Court must cancel them. The time, manner and conditions of cancelling them and of terminating the Trust are to be

fixed by the trial court. This is the "usual course of proceedings" in any case in equity.

See *Restatement of the Law of Trusts*, Sec. 347 (n); vol. 65 C. J. section 128, p. 353, also *Coulter v. Robertson*, 24 Miss. 278, 57 Am. Dec. 168.

III.

The Circuit Court of Appeals has failed to follow a rule of procedure promulgated by this Court, and its action demonstrates the necessity for an exposition by this Court of the scope and effect of the rule.

Reason III does not come within the provisions of Rule 38 of this Court, and Rule 52 of the Federal Rules of Civil Procedure which is referred to, applies only to District Courts. Rule 1, F.R.C.P.

The Petition does not enlighten us as to "the way the Rule was intended to be applied or the manner in which it should be made effective", nor in what respect, if any, the action of the District Judge was "inconsistent with substantial justice". Rule 61 of the Federal Rules of Civil Procedure is directly applicable.

Petitioners made no objection to the oral statement of the District Judge. They did not even refer to it in the Circuit Court of Appeals.

From a reading of page 31 of the Petition, we must assume that what Petitioners really mean by this "Reason" is that the Circuit Court of Appeals should not have re-

viewed the findings of fact or conclusions of law of the District Judge. No further discussion of such "Reason" is necessary.

IV.

The rights of minority interests and trustees under bondholders' protective agreements creating common law trusts in states where such trusts are valid under the English doctrine of uses under the Statute of 27, Henry VIII, should be examined by this Court, and related to practice and procedure in the Federal Courts.

"Reason" IV also discloses Petitioners misconception of the functions of a Petition for a Writ of Certiorari. This Court does not grant a writ merely for the purpose of expounding a theory of law for the general benefit of bench and bar, but only for the decision of a litigated cause. There is no "relation between the substantive law of trusts and Federal practice and procedure" which requires clarification, for the substantive law of trusts in Federal Courts is *the substantive law of the state* and cannot conflict with the Federal law of procedure.

Since bondholders' protective agreements are entirely matters of voluntary contract, parties are free to incorporate any provision that is legal. There is no general law of them distinct from the general law of contracts and trusts.

The very wording of the "Reason" excludes serious consideration of it as a "reason" for the issuance of a Writ of Certiorari.

V.

The Circuit Court of Appeals has decided this action on a theory not presented by record before it, without giving the parties an opportunity to be heard thereon, thus depriving petitioners of their day in court.

"Reason" V relates solely to procedure. True, it alleges that the order remanding the case to the District Court permits of relief that was not prayed for in the Complaint, but this is not even an error, much less a violation of the Federal Constitution. The Complaint prayed for an injunction. The District Court denied that relief. The Circuit Court of Appeals holds that the District Court erred and should have enjoined issuance of the Refunding Debentures. Meantime, the void Debentures have been issued and a different *form* of relief must be granted.

The Complaint also prayed for delivery of the securities held by Defendants and in the alternative for general relief. Under the new rules of Federal Procedure, the Court is authorized to grant any form of relief to which Plaintiffs are entitled. If the form of relief to be granted at this time differs from that which should have been granted at the trial, it is due to the erroneous decree of the trial court and to the action of the Defendants, who, after the injunction was denied, gravely abused their discretion, changed the positions of the parties, and must be dealt with accordingly.

CONCLUSION

The Petition presents no Constitutional or Federal questions; no questions of state law are involved; the procedure is regular and there is no reason which would justify a review of the decision of the Circuit Court of Appeals by this Court.

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